NO. 16072

United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a Corporation,

Appellant,

vs.

NORTHWEST CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

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BEDE-HIBBITT, INC., PORTLAND, OREGON 11-58

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SUMMARY OF ARGUMENT

I. Even though a complaint against the insured asserts a cause of action upon various grounds which are not within the coverage of the policy, the duty to defend arises from any allegations setting forth the cause of action which might be within the coverage.

II. The endorsement entitled "Exclusion of Product Liability" is confined to goods or products manufactured, sold, handled or distributed by an insured.

III. The term, "liability imposed by law" does not prevent the insured from recovery under the policy if insured settles and compromises a claim after the insurer wrongfully refuses to accept coverage under terms of policy.

ARGUMENT

I. Even though a complaint against the insured asserts a cause of action upon various grounds which are not within the coverage of the policy, the duty to defend arises from any allegations setting forth the cause of action which might be within the coverage.

Appellee first argues that the obligation to defend an action against the insured does not arise where it appears from the gravamen of the complaint that the claim is *clearly* outside the coverage. (Appellee's Brief, P 5). This is a conclusion which is not supported by the allegations of the Buffington Complaint, for it could well have been determined by a court or jury that the proximate cause of the accident and injury to the complainant was the use of faulty equipment by the insured, but for which no accident would have occured.

Appellee, in support of its contention, cites the case of *MacDonald v. United Pacific Insurance Company,* 210

Or. 395, 311 P2d 425, (Appellee's Brief, P 5), which case was not purposely omitted but inadvertantly not listed in Appellant's Brief. This case in no way contradicts appellant's argument. But in fact supports appellants contention. The actions brought against MacDonald were for assault and battery, which as the court stated was by its very essence an allegation that MacDonald was guilty of an *intentional* attempt by force and violence to do an injury to the person of another, coupled with the present ability to carry the intention into effect, and consummated by hostile, unpermitted physical contact with the person. (P 399). The policies specifically excluded "injury * * * caused *intentionally* by * * * the insured."

Appellee, as a final point, cites a case which appellant referred to, which is the case of *Employers Liability Assurance Corp., Ltd., v. Youghiogheny & Ohio Coal Co.,* (CCA 8) 214 F2d 418. Appellee, in commenting on this case, becomes trapped in its own language, in that it fails to distinguish between defective or faulty equipment and a defective product. The court in the *MacDonald case,* supra, considered the companion case, *Youghiogheny & Ohio Coal Co. v. Employers' Liability Assurance Corp.,* Minn. 1953, 114 F. Supp. 472, and stated on Page 406 as follows:

> "If in the pending case the injured parties had sued the plaintiff by a complaint asserting both negligent injury and assault and battery, a different problem would have been presented and it might have

> been the duty of the insurer to defend at least until it was established that the injury was intentional. The decision in the Youghiogheny case was based on the finding that a part at least of Burnett's Complaint did allege facts which fell within the coverage of the policy. The coal company was therefore entitled to recover both the amount paid by it in settlement and the expense incurred in defending Burnett's suit."

In the case at hand, therefore, we are not called upon, as appellee claims at Page 7 of Appellee's Brief, "for consideration of the gravamen of her complaint," but rather to consider the specific charges found in the Buffington Complaint, and appellant contends that use of faulty equipment states a cause of action within the general insuring clauses of the insurance contract and not excluded under the products exclusion endorsement.

II. The endorsement entitled "Exclusion of Product Liability" is confined to goods or products manufactured, sold, handled or distributed by an insured.

Appellee first contends that the case of *Philadelphia Fire & Marine Insurance Co. v. City of Grandview,* 42 Wash. 2d 357, 255 P2d 540, and the case of *A. R. Heyward II and C. D. Tucker,* doing business as *W. B. Guimarin & Company v. American Casualty Company* of Reading, Pennsylvania, 129 F. Supp 4, (Appellee's Brief, Pp 11, 12) are cases which, although cited by appellant, support appellee. The appellee again fails to distinguish between defective or contaminated products manufactured, sold, handled or distributed by an insured which give rise to an accident causing injuries to a third person and acci-

dents causing injuries which stem from the use of faulty equipment. The proximate cause of the injuries in the two above-cited cases were thus distinguished by the courts and certainly support appellant's contentions. In the *City of Grandview case,* supra, the city was not manufacturing or selling gas, and the court held that the proximate cause was the negligence of the city in permitting the gas to be introduced into the injured party's home and that this was not in any way a product manufactured, sold, handled or distributed by the insured, and in the *Heyward case,* supra, the court held that the allegations of the complaint and the proximate cause of the injury was the negligent construction of the plumbing and heating portions of a housing project and that there was no claim that the products installed were defective products in any way.

Appellee, in support of its argument, cites the following cases:

Loveman, Joseph & Loeb v. New Amsterdam Cas. Co., 233 Ala. 518, 173 So. 7.

Standard Acc. Ins. Co. v. Aberts (CCA 8), 132 F. 2d 794.

Farmers Co-op. Soc. v. Maryland Cas. Co., 135 SW 2d 1033.

Carter v. Nehi Beverage Co., 329 Ill. App. 329, 68 NE 2d 622.

Lyman Lumber & Coal Co. v. Travelers Ins. Co., 206 Minn. 494.

Appellant has read each of the above-cited cases, and not one of them has any act of negligence alleged, contending that the proximate cause of any accident and

injury is the result of the use of faulty equipment by the insured. The cases, therefore, are not in point. Appellee again fails to consider the point of appellant as upheld by the cases cited by appellant to the effect that faulty equipment is not "goods or products manufactured, sold, handled or distributed by the insured."

Appellee further contends that if the purchase by Buffington is regarded as operations, the operation was concluded on the date of delivery and an accident occuring the following day was exempted from coverage under this policy. (Appellee's Brief P. 17). Should this court consider this argument, we refer to the case of *Reed Roller Bit Co. v. Pacific Employers Ins. Co.*, 5 Cir., 198 F. 2d 1.

The plaintiff, Reed Roller Bit Company, appealed from a judgment in favor of the defendant to dismiss the complaint for failure to state a claim upon which relief could be granted to plaintiff. It involved an action upon a liability insurance policy to cover expenses, attorneys fees and money paid by plaintiff in settlement of an action brought against it for negligence in representing that a certain abrasive wheel of another company, when used upon Reed's grinding machine, was not dangerous, whereas as a matter of fact, it was dangerous and not safe to use on Reed's machine, and an injury occurred as a result of said use. One of the grounds of negligence charged was the representation by the employee that the article was safe for use and was being used at the time of the accident wherein it was not safe for the purpose intended. The plaintiff contended that by reason of this allegation of negligence,

the company became bound and obligated under the terms of the policy to pay any damages recovered or paid in good-faith settlement within the policy limits.

The policy contained within it a products clause almost identical to that of the case in hand. It further contained a premises-operations coverage clause covering operations which were necessary to the ownership, maintenance or use of the premises. The District Court concluded that the negligence charged against Reed was with respect to one of its products, and the Appellate Court held this to be error in that the negligence charged against Reed was with respect to the acts and representations of Reed's agent and salesman. The court stated as follows:

> "* * * Considering the alleged representations of Reed's Agent to be 'operations' were they operations which had been completed before the accident occured such as would come within the coverage under 'Products' and be excluded from the coverage under 'Premises-Operations'? To answer in the affirmative would result in relieving the Insurance Company from any liability for negligence representations of the agents or salesmen of the insured because, of course, no person could be injured as a result of acting upon a negligence representation until after the representation had been made to him.
>
> "We hold that an operation consisting of a negligent representation made for the purpose of or reasonably calculated to induce action *is not completed until the person to whom the representation is made acts in reliance upon that representation.*
>
> "The result follows that the plaintiff's complaint states a claim upon which relief can be granted, and that the judgment of the District Court dismissing

said complaint is reversed and the cause remanded for trial."—(Italics ours).

The *Reed Roller Bit case,* supra, was decided in Texas by the United States Court of Appeals twelve years after the Texas case of *Farmers Co-op. Soc. v. Maryland Cas. Co.,* 135 SW 2d 1033, supra, cited by appellee, and does not even make reference thereto.

Also, in the case of *Ocean Accident & Guaranty Corporation, Ltd., v. Aconomy Erectors, Inc., and Roy J. Green, Administrator of the Estate of John A. Green, deceased,* (United States Court of Appeals, 7th Cir., June 21, 1955) 224 F. 2d, 242, the question was raised as to whether or not the work of an Insured upon a building had been completed at the time of a fatal accident so as to deny coverage under the policy by reason of a provision in the policy as to completion of operations under provisions similar to those in other cases cited herein and the action at hand. The allegation of the plantiff in the action brought against the Insured was that the injury to the deceased was caused by "Imperfect and Negligent Construction of the Welding and Placing of the said steel beams by" (Defendant-Insured). The court, after determining that a real factual issue had been raised as to the material facts in the case sufficient that the court could not grant a summary judgment as had been done in the lower court, stated as follows:

"2. A careful reading of the policy raises another question which might be controlling in this case. The true meaning of the policy is difficult to determine. An examination of it involves a physical effort of no

mean proportions. Starting out with three printed pages, the first of which consists largely of a form which is filled in on a typewriter, the reader is confronted also with six physically attached supplements, or riders, inconveniently assorted into different sizes. If he is possessed of reasonable physical dexterity, coupled with average mental capacity, he may then attempt to integrate and harmonize the dubious meanings to be found in this not inconsiderable package. A confused attempt to set forth an insuring agreement is later assailed by such a bewildering array of exclusions, definitions and conditions, that the result is confounding almost to the point of unintelligibleness. To describe the policy as ambiguous is a substantial understatement. To ascertain its meaning we are forced to seek refuge in the well settled rules that insurance contracts are to be construed liberally in insured's favor and strictly against the insured. (Citing Cases) and conditions and stipulations in the policy are to be construed most strictly against the insurance company (Citing Cases).

"Guided by these rules, it might reasonably be claimed that there emerges through the confusing language and the shapeless masses of words before us, an intention to protect Aconomy from the commonplace risks incidental to the business of a construction contractor. Was that the protection for which Aconomy paid a premium? If it could be deduced that the meaning of the policy is that the building under construction, to the extent that it was controlled by Aconomy in doing its work under contract with Svejcar, was the premises covered by the policy, and the work done there by Aconomy constituted the operations, the hazards of which were insured, it might be seriously contended that Aconomy was and is entitled to the protection of the policy insofar as the Green Accident is concerned.

"It might be in good faith argued that there were no 'products' insured by this policy, because the word,

> 'Products' was intended to refer to articles made by an insured and offered for sale, and further, that there is therefore no occasion to consider the argument of plaintiff in regard to the difinition of 'products hazard' contained in the policy and, for the same reason, the question of whether the operation of Aconomy had been completed at the time of Green's accident, is immaterial."

Appellant contends that the Reed Roller Bit case and Ocean Accident case are cases wherein the acts of negligence did not relate to products or a condition in goods or products manufactured, sold, handled or distributed by the insured.

By analogy, it cannot be said that appellant manufactured, sold, handled or distributed, within the language of the products exclusion rider, *faulty equipment.*

III. The term, "liability imposed by law" does not prevent the insured from recovery under the policy if insured settles and compromises a claim after the insurer wrongfully refuses to accept coverage under terms of policy.

Appellee claims that the provision in the policy that insurer would only pay such sums for and on behalf of insured that insurer would become obligated to pay by the liability imposed upon him by law, prevents recovery by the appellant herein for the reason that appellant was not obligated by law to pay Buffington the sum of $15,000.00, and further, that liability imposed by law means the "amount of final judgment." (Appellee's Brief, P. 19). This is not the law.

In support of this contention, Appellee cites: *The Philadelphia Fire & Marine Insurance Co. v. City of Grandview case,* and *Girard v. Commercial Standard Ins. Co.* (Appellees Brief, P 19). Appellant does not take issue with either of these cases, but does state that the said cases are not at all in point with the case at hand.

It is the contention of the Appellant that where a complaint alleges facts which represent a risk outside of the coverage of the policy, but also avers facts as in the Buffington complaint, which if proved, represent a covered risk, the insurer is under a duty to defend and in failing to contend the insurer is responsible to reimburse the insurer for the amount of any reasonable settlement, together with the insured's expenses relative thereto.

It is a well-settled rule of law that where an insurance company denies liability and refuses to defend an action, the insurer has the right, provided he acts in good faith and with due care and prudence, to enter into a compromise and settlement, and thereafter proceed against the insurer for amounts expended in the defense of the suit as well as the amount for which the cause was settled and compromised. The courts generally hold that an insurer may avail itself of a "reservation of rights" and proceed to defend the suit until such time as it may deem that it has no liability. To refuse to defend when there is liability is a breach of contract, and the insured may proceed to settle and compromise the action even though the policy provides otherwise.

8 Appleman Ins. L. & P., Paragraph 4690, Page 13 and Paragraph 4694, Page 62.

Youghiogheny & Ohio Coal Co. vs. Employers' Liability Assur. Corp., Ltd, 114 F. Supp 472.

Continental Casualty Co. v. Shankel, CCA 8, Okl. 1937, 88 F2d 819.

Hardware Mutual Casualty Co. v. Hilderbrandt, C. A. Okl. 1941, 119 F2d 291.

Basta v. United States Fidelity & Guaranty Co., 107 Conn. 446, 140 A 816.

The Court below, in the instant case, has already determined that the settlement was a fair and reasonable one and that the costs and attorneys' fees expended in the defense and settlement of the Buffington case were fair and reasonable.

CONCLUSION

The allegations of negligence set forth in the Buffington Complaint were such as were covered under the general insuring agreements of the Comprehensive Public Liability Policy written by appellee and upon which appellant appeared as a named insured. The decision of the court below should be reversed and the appellant awarded judgment for the amounts as prayed for in its Complaint, as well as reasonable attorneys' fees to be therein determined.

Rule 18 (2) (d) of the rules of this court are to the effect that when findings are specified as error, the specifications shall state *as particularly as may be* wherein the findings of fact and conclusions of law are alleged to be erroneous. An examination of the transcript of record on appeal will

reveal that the sole question in controversy has been the contention by appellant and the denial by appellee that the acts of negligence set forth in the Buffington Complaint were within the general insuring agreements of the policy and not affected by the products exclusion endorsement. The decision of the lower court, as set forth in its opinion, (R., p 36) determined this question adverse to appellant. Appellant appealed from the findings of fact and conclusions of law based upon this opinion and the judgment entered therein, as set forth in appellant's "STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL," (R., pp 42, 43), "STATEMENT OF THE CASE," (R., pp 2, 3, 4), and "STATEMENT OF POINTS TO BE URGED" (Appellant Brief, P 4). All other matters were resolved. Appellant feels it has substantially complied with the rule as set forth and cannot ascertain wherein appellee has been unduly burdened.

Respectfully submitted,

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